



# Don't Take Risks with Social Media

Online social networks can raise legal risks. Here's what to keep in mind.

By Jeffrey S. Tenenbaum & A.J. Zottola

**S**ocial networking sites, such as MySpace, Facebook, Twitter, and LinkedIn, present new ways for your organization to connect with people, spread the word, and target messages. But incorporating social media and online networking sites into your larger communication and marketing strategies raises a number of potential legal and liability risks.

With advance planning, however, you can manage these risks. The following is a non-exhaustive list of legal tips and issues to consider whenever your organization creates, sends, or sponsors content in connection with social media.

**It's More Public than You Think.** There remains a disconnect be-

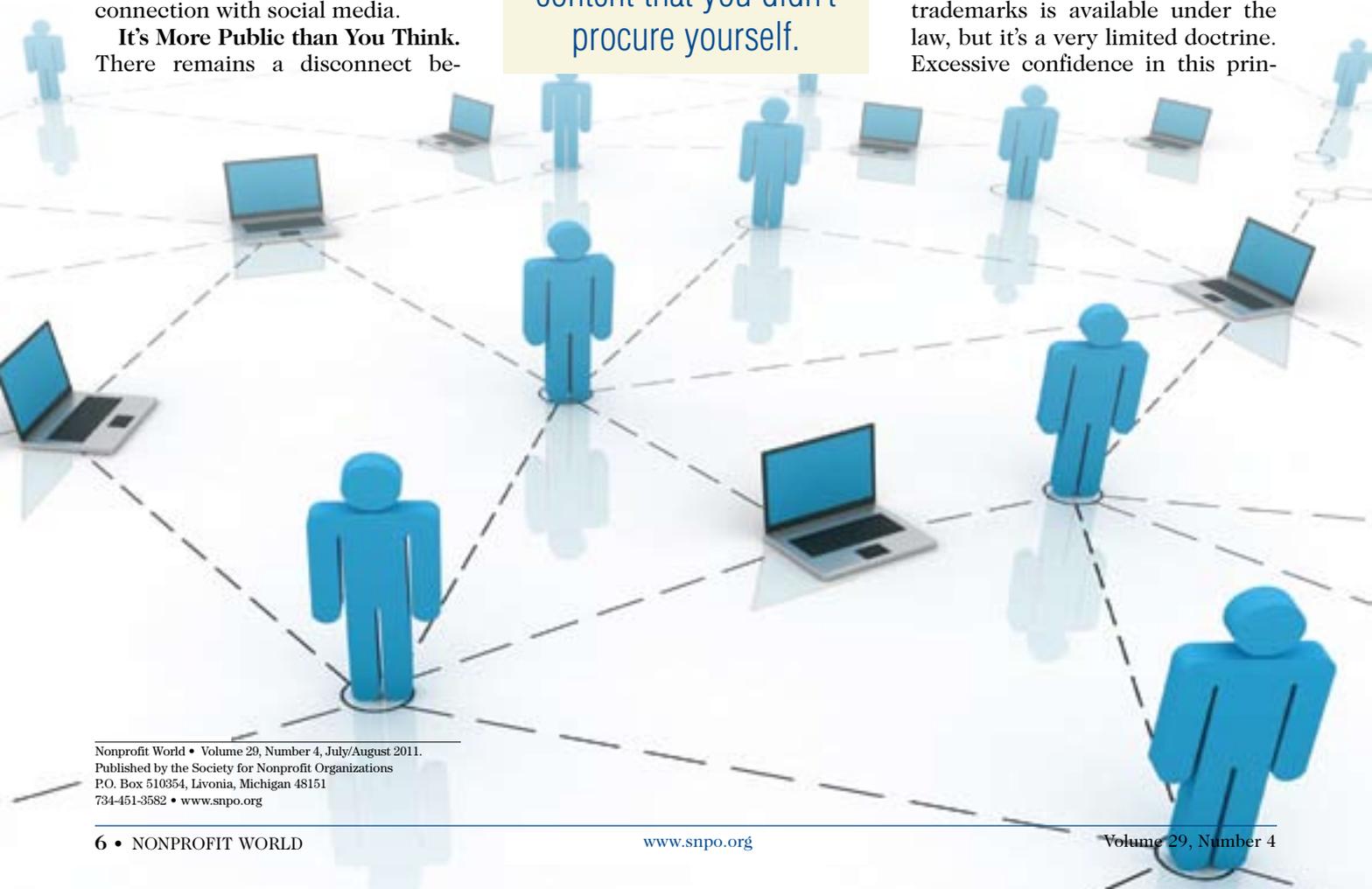
tween what people believe they're sharing on a social networking site and the reality. Far more is being preserved for future display than most people realize. You need to be careful, therefore, about what you post or send. Always assume that greater (not less) publication or disclosure is possible.

**Avoid Using Material without Permission, and Provide Proper Attribution for Content from Other Sources.** Given the ease with

which material can be obtained online, copyright infringement is a special concern. Use caution when posting content that you didn't procure yourself or receive permission to use. With any licensed material, abide by license terms and be sure the right to use extends to electronic formats (or modify your license permission to secure such rights). Always comply with requirements regarding attribution when using content within an online social network.

Don't rely on notions of "fair use" as a defense for your activities. Fair use of either copyrightable works or trademarks is available under the law, but it's a very limited doctrine. Excessive confidence in this prin-

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ciple is a risky course of action.

**Be Careful about Letting Others Post Content.** Use special care when managing a page within a social network that lets a third party (such as one of your organization's members or supporters) post content. Such a situation can give rise to liability for copyright infringement, torts, or defamation. Avoid encouraging the copying of third-party content. Seek the consent of the author, owner, or subject before reproduction or use. This advice applies not only to posting content but also to storing content for further re-distribution or display.

Take care whenever people insert their own commentary into material created by someone else. Be especially mindful of negative content that identifies a particular person or entity. Be sure you have a take-down policy that doesn't tolerate repeat offenders.

**Know Your Identity and Role.** Social media and networking sites can make it easy for outsiders to pretend they're acting on behalf of your organization. Thus, it's vital for you to announce your organization's role in the content distribution, display, and publication process. Clearly state what constitutes your organization's official page, site, or communication within the online network. Distinguish your organization's official content from unaffiliated pages, sites, or communications.

Whenever you encourage people to connect to your site or add input, it's safest to function as much as possible as a passive operator, conduit, or distributor. Try not to identify your organization as an author or editor of information that was actually sent by someone else. Always monitor your interactions with other users so that you can distinguish your material from theirs.

**Take Advantage of Potential Im-**

**munity.** Certain immunities may be available when copyright infringement, tortuous conduct, or defamation occurs. Although the following laws predate online social networking, they may offer immunity in some cases:

- **The Digital Millennium Copyright Act of 1998 (DMCA)** lays out safe harbors for "Internet service providers" that could protect you from copyright infringement claims.

- **The Communications Decency Act of 1996 (CDA)** protects providers or users of interactive computer services from civil liability for defamation, invasion of privacy, negligence, and trespass claims.

In both cases, immunity is available only for liability resulting from information provided by a third party. That's why it's crucial that your organization remain a mere content conduit rather than a provider or creator of posted information. The more editorial or publishing control you take, the less likely that you'll be protected under the DMCA or CDA. Moreover, to qualify for the DMCA, you must be sure to take down infringing material when notified by the copyright owner.

**Be Cautious with Hyperlinks to Third-Party Sites.** Linking is commonplace within online social networks. Therefore, it's important to disclaim responsibility for any third-party site or page that you can't control. Although mere linking may not suffice to find copyright or trademark liability, avoid directing anyone to exploit any material on a third-party site or page. Never frame, deep link to, or incorporate any third-party content without permission when you link to other sites or pages.

**Don't Misuse Trademarks.** Gain permission before using third-party trademarks in online social media. Never use third-party trademarks in user or account names, as keywords, or for search optimization.

**Be Wary about Contests.** Always

seek legal counsel before holding a contest through an online social network, especially if a prize having cash value will be awarded. Numerous state laws govern online raffles, lotteries, sweepstakes, and other contests. Certain prize or reward practices can constitute illegal gambling. Accordingly, for any promotion involving a contest, consider the scope of permissible participants (by state), include terms and conditions, and carefully review any fees or charges for entry.

**Watch What You Say when You Market.** Be careful with any practice that's really advertising in disguise. For example, certain social networking techniques, such as blogging about an organization, can be treated as advertising if a product or service is discussed. The Federal Trade Commission (FTC) may penalize bloggers who endorse a product or service without disclosing that they're being compensated or are connected to the seller in some other material way.

Don't rely on notions of "fair use."

Be sure to monitor all promotional campaigns you conduct within an online social network. The viral nature of a social network is its great advantage—but also a reason to be alert. Never leave a promotional campaign to the complete discretion of unaffiliated entities or users.

**Don't Ignore Privacy Rights.** Remember that privacy considerations, particularly with respect to children under the age of 13, apply to social networking sites. Be careful about publishing anyone's personal information, especially if it's not generally known or available to the public. If you plan to collect personal data, post a privacy notice describing your data collection and use practices.

**Be Vigilant when Sending Unsolicited Communications.** E-mail campaigns may be subject to laws governing unsolicited e-mail, such as the CAN-SPAM Act of 2003. Therefore, always consider whether the recipient has consented to re-

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At a minimum, be sure to use opt-out notices.

## A Checklist for Social Media Legal Notices & Policies

Here are some stipulations you may want to include when preparing policies, agreements, or legal notices associated with social networking sites:

**Antitrust Policies.** Remind people not to use social networking sponsored by your organization to make an anti-competitive agreement (such as price-fixing or market allocation), share competitively sensitive information, or disparage vendors, suppliers, or competitors.

**Contests.** For any promotion involving a sweepstakes, raffle, lottery, or other contest, set forth terms, conditions, and the scope of permissible participants (by state).

**End-User Conduct.** Add a clause requiring end users to take responsibility for their own actions and to abide by applicable laws and online conditions.

**General Disclaimer and Limitation on Liability.** Include a general disclaimer of any warranties your organization won't offer and a contractual limit on your organization's liability.

**Governing Law.** Specify the state law you'll use to enforce your organization's rights. With online transactions, there are no state borders in a traditional sense. So referring to an applicable state law ties your agreement to a particular location. By noting that a particular law will apply, you avoid having someone apply a law from a foreign jurisdiction, which may be unfavorable to your organization. (There's no harm in specifying a federal law as well as a state law. But there's a presumption that if a state law is cited, federal law will also apply.)

**Intellectual Property.** Include a provision to reserve rights in your organization's intellectual property displayed online. Add a proprietary notice for copyrightable works and trademarks.

**License Grant.** Include a pre-emptive license grant for people to use your organization's content, materials, and other intellectual property. When you encourage others to connect to your organization's page, to post supporting information, or to generate communications in line with your organization's objectives, you need to provide such permission or guidelines for use.

**Linking Policy.** Provide a specific disclaimer for interaction with third-party sites.

**Opt-out notice.** Give people an easy way to tell you they don't want to receive any further communications from you.

**Postings.** Make note of the fact that the unauthorized use or copying of third-party content, as well as the posting of any unlawful or objectionable content, is prohibited.

**Privacy Policy.** Furnish a cross-reference to your organization's privacy policy.

**Responsibility for Use.** Include a provision requiring the end user to acknowledge that your organization isn't responsible for third-party conduct.

**Role Clarification.** Clarify your organization's role in the content distribution, display, and publication process. This is especially important when declaring what constitutes your organization's official page, site, or communication within an online network and distinguishing it from unaffiliated pages, sites, or communications.

**Take-Down Policy.** With interactive forums, create a policy making it clear that you'll immediately remove any defamatory, infringing, or incorrect content.

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ceive communications, and obtain such consent whenever possible for commercial messages. At a minimum, be sure to use opt-out notices.

**Monitor Blogs and Other Instant Communication Forums.** The frequency with which blogs and other instant communication tools, such as Twitter, are updated can increase your exposure to liability. If you use a blog or similar forum, be sure to create policies clarifying your organization's responsibility for its content.

**Protect Your Intellectual Property.** Remain aware of new content, trademarks, domain names, or methods created with respect to social media. Seek intellectual property protection and registration for any such material. Reserve rights in your intellectual property when it's used or displayed online.

With most social networks, copying isn't only the sincerest form of flattery but also the easiest way for intellectual property rights to be infringed or diluted. Consider using a <sup>TM</sup>, @, or © symbol when placing your intellectual property online. Provide notices and conditions for any use of your intellectual property by others within an online social network. Monitor use of your intellectual property by other users.

**Guard against Antitrust Risks.** Social networking sites make it easy for users to let their guard down and share information that could lead to violations of antitrust laws. Be certain to enforce antitrust policies with respect to social media. Explain to users that they may not communicate via organization-sponsored social networking to make an anti-competitive agreement or share competitively sensitive information if they would be prohibited from sharing this information directly between each other.

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## Be sure you have a take-down policy that doesn't tolerate repeat offenders.

Caution users against making comments that could be seen as an attempt to rally others to boycott a supplier, customer, or competitor. Such actions could cause you to be accused of serving as a conduit for sharing information that violates antitrust laws.

To further minimize risk, post antitrust guidelines on your social networking pages. Include procedures for reporting potential violations. Remind all visitors of their responsibilities to comply with antitrust laws.

**Remember Your Staff.** Let your employees know how you expect them to behave when using social networking sites. Define for them the difference between online action for personal reasons and acts taken on behalf of your organization. There's more and more blurring of personal and business conduct during the day. Create clear, written policies to manage this situation.

**Develop Policies for Social Media.** The terms of service provided by social network providers are primarily for their benefit, not yours. Thus, it's imperative that you devise your own policies and agreements to protect your organization. Be sure you implement a policy statement and contractual provisions that address responsibility, indemnity, limitation of liability, disclaimers, antitrust compliance, and intellectual property use and ownership. ■

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### Where to Learn More

([www.snpo.org/members](http://www.snpo.org/members))

#### More on Social Media

- Using Social Media to Advance Your Goals (Vol. 27, No. 1)
- How to Make Social-Media Fundraising Work for You (Vol. 27, No. 2)
- Is It Time to Consider New Ways to Communicate? (Vol. 25, No. 4)
- Accelerating Fundraising through Social Media (Vol. 28, No. 3)
- Using Web 2.0 Technologies to Connect with New Supporters (Vol. 27, No. 4)

#### More on Copyright & Fundraising Law

- How the DMCA Affects Fundraising (Vol. 22, No. 4)
- Why You Should Consider Trademark Protection (Vol. 23, No. 4)
- Should You Hold a Raffle? (Vol. 13, No. 1)
- Legal Advice on Using the New Media (Vol. 28, No. 6)

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